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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13

14 RICHARD TRAVERSO,

15 Plaintiff,

16 vs.

17 CLEAR CHANNEL OUTDOOR, INC., and
18 DOES 1 – 10,

19 Defendants.
20
21
22

Case No.: C07-3629 MJJ

**REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS
UNLAWFUL DETAINER COMPLAINT OF
PLAINTIFF RICHARD TRAVERSO**

Date: October 2, 2007
Time: 9:30 a.m.
Courtroom: 11 (19th Floor)

HON. MARTIN J. JENKINS

23
24 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

25 Defendant Clear Channel Outdoor, Inc. ("Clear Channel") submits this reply memorandum
26 of points and authorities in support of its motion to dismiss.

27 ///

1 **A. Notice of Termination of the Lease Must be Served Personally**

2 In California, unlawful detainer statutes must be strictly interpreted and applied. *WDT-*
 3 *Winchester v. Nillson*, 27 Cal. App. 4th 516, 520 (1994). Here, Plaintiff elected to sue for unlawful
 4 detainer as opposed to an ordinary breach of the Lease claim. As a result, Plaintiff is held to a higher
 5 standard with respect to his pleading and service requirements, a standard which Plaintiff failed to
 6 meet.

7 Plaintiff alleges that he served the Notice “in the manner specified in [the Lease].”¹
 8 Complaint, ¶8.a(5). Ordinarily, parties to a commercial lease may agree upon notice requirements
 9 other than those set forth by the statutes, but any waiver of such statutory rights must be *expressly*
 10 agreed to by the parties. *See Folberg v. Clara G. R. Kinney Company, Inc.*, 104 Cal. App. 3d 136,
 11 139-140 (1980). Here, however, the Lease does not specify a particular manner of service, and Clear
 12 Channel therefore did not waive its statutory rights. *See* Complaint, Ex. 1 at ¶7.

13 In the absence of an agreement to the contrary, Section 1162² mandates *personal service* of
 14 the Notice. The statutory requirement must be strictly applied *and* pleaded with specificity.
 15 *Folberg*, 104 Cal. App. 3d at 140; *Nillson*, 27 Cal. App. 4th at 520; §1166(a). Plaintiff argues in his
 16 Opposition that, pursuant to Section 1161(1), no notice was required because Clear Channel
 17 continued in possession after expiration of the term of the Lease. *See* Opp. at II.A. By its own
 18 terms, however, the Lease does not expire automatically. Rather, the parties agreed to automatic
 19 term extensions unless the Lease was properly terminated. *See* Lease, Complaint, Ex. 1 at ¶7.
 20 Plaintiff’s attempt to rely on Section 1161(1) assumes that the Lease term had *already expired* and,
 21 on that basis, that no notice was required. But this is a circular argument since proper service of the
 22 Notice is a *condition* of termination under the express terms of the Lease; if no notice is served, the
 23 Lease automatically renews for a further five year term.

24
 25 ¹ Plaintiff’s argument that he properly alleged the manner of service of the notice of termination is also misguided.
 26 Plaintiff contends that he met his pleading obligation by checking the box under Judicial Council Form 8.a.(5) for service
 27 “in the manner specified in a written commercial lease between the parties.” The Lease, however, does not set forth a
 28 manner for service and therefore this allegation is inconsistent with the Lease attached to the Complaint, and, in turn,
 does not meet the requisite level of specificity.

² All statutory references are to the California Code of Civil Procedure, unless otherwise specified.

Accordingly, Plaintiff cannot avail himself of the benefits of Section 1161(1), and is instead bound by the notice requirements of Section 1162. While Plaintiff suggests that personal service is not *necessarily* required under that provision, the alternative methods of service by mail and delivery [Section 1162.2], or affixing the notice at the property [Section 1162.3], may only be used if the tenant is not present at the location, or if the tenant's place of business cannot be located. *See* §1162. Plaintiff makes no such allegations here, and the personal service requirements of Section 1162.1 clearly apply.

Where a Complaint fails to allege the fact of service of the required notice to terminate, the Complaint fails to state a cause of action for unlawful detainer. *Zucco v. Farullo*, 37 Cal. App. 562 (1918). Here, Plaintiff failed to allege personal service of the Notice, and his cause of action for unlawful detainer is therefore fatally deficient.

B. Plaintiff's Request for Rule 11 Sanctions Is Improper

Plaintiff seeks an order to show cause why sanctions should not be issued under Rule 11, on the spurious grounds that Clear Channel allegedly "misrepresented the law," made frivolous arguments related to the factual inconsistencies in the Complaint, and should have instead filed a motion for a more definite statement under Rule 12(e). Plaintiff also complains that these proceedings have not moved as fast as he would like, though this clearly does not form the basis of a Rule 11 sanctions request and, in any event, could have been avoided if this action had been filed in federal court, or if Plaintiff had properly alleged his unlawful detainer claim in the first place. Clear Channel submits that Plaintiff's request is borderline frivolous, and should be denied.

Initially, Plaintiff's request is procedurally improper. Rule 11 sanctions must be sought by motion, and the party against whom sanctions are sought is entitled to a "safe harbor" period, which prevents the moving party from filing a Rule 11 motion until 21 days *after* it is served. FRCP 11(c)(1)(A). Likewise, Civil Local Rule 7-8 mandates that a motion for sanctions be separately noticed and filed. Plaintiff ignored these procedural requirements and its request should be denied on this basis alone.

Plaintiff fares no better on the merits of its sanctions request. "Because of the detrimental impact sanctions have on an attorney's career, Rule 11 sanctions are reserved '*for the rare and*

1 *exceptional case where the action is clearly frivolous*, legally unreasonable or without legal
 2 foundation” *Burnette v. Godshall*, 828 F. Supp. 1439, 1447 (N.D. Cal. 1993) (citing *Operating*
 3 *Engineers Pension Trust v. A-C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988) (emphasis added)). “Thus,
 4 when a court considers a request for sanctions, it must resolve all doubts in favor of the signer of the
 5 pleading or paper.” *Id.* Moreover, Rule 11 was not intended to “chill an attorney’s enthusiasm or
 6 creativity in pursuing factual or legal theories” and consequently sanctions are reserved for only “*the*
 7 *most egregious situations*, lest lawyers be deterred from vigorous representation of their clients.
 8 *Brown v. Baden (In re Yagman)*, 796 F.2d 1165, 1182 (9th Cir. 1986); *United National Ins. Co. v.*
 9 *R&D Latex Corp.*, 242 F.3d 1102, 1115 (9th Cir. 2001).

10 Plaintiff asserts that Clear Channel misstated the law by failing to quote Section 1166(a)(5)
 11 in its entirety and by arguing that the Notice had to be personally served. But Clear Channel cited
 12 Section 1166 for the proposition that a party asserting a claim for unlawful detainer is required to
 13 “*State specifically the method used to serve the defendant with the notice or notices of termination*
 14 *upon which the complaint is based.*” Plaintiff does not, and cannot dispute that the specificity
 15 requirement applies. Rather, Plaintiff argues that the Complaint satisfied the pleading requirements.
 16 Clear Channel disagrees, for the reasons set forth above.

17 The parties’ disagreement on whether the pleading requirements of Section 1166 were
 18 satisfied, is par for the course in litigation. Recognizing this fact, federal courts have repeatedly
 19 warned against use of Rule 11 where the parties disagree on the correct application of the law. *See*
 20 *Morristown Daily Record, Inc. v. Graphic Communications Union, Local 8N*, 832 F.2d 31, 32 (3d
 21 Cir. 1987) (“We caution litigants that Rule 11 is not to be used routinely when the parties disagree
 22 about the correct resolution of a matter in litigation.”)

23 Plaintiff’s assertion that Clear Channel misrepresented the law on personal service is also
 24 plainly improper, because it amounts only to an argument against application of the law in the
 25 manner advocated by Clear Channel. Moreover, Plaintiff’s arguments on the issue of personal
 26 service are circular and intellectually flawed for the reasons set forth above. Similarly, Plaintiff’s
 27 claim that Clear Channel’s attack on the inconsistencies of the Complaint was frivolous, is belied by
 28 the inconsistencies themselves, which are self-evident. Finally, Plaintiff’s attempt to use Rule 11 to

1 bully Clear Channel into filing a Rule 12(e) motion instead, which presumably would have been
2 more palatable to Plaintiff, is totally inappropriate, as Rule 11 was not intended to “chill an
3 attorney’s enthusiasm or creativity.” *Brown*, 796 F.2d at 1182.

4 California unlawful detainer law is technical, and its statutes must be strictly interpreted and
5 applied. *See Nillson*, 27 Cal. App. 4th at 520. As set forth above, having availed itself of the
6 unlawful detainer statutes, Plaintiff must comply with their pleading and service requirements.
7 Plaintiff cannot now complain because he failed to do so. Plaintiff’s request for sanctions here is
8 supported only by his assertion that Clear Channel is wrong about the law. As such, the request is an
9 abuse of Rule 11, and should be rejected.

10 **C. Conclusion**

11 Clear Channel respectfully requests that its motion be granted and that Plaintiff’s request for
12 sanctions be denied.

13 DATED: September 18, 2007

14 REED SMITH LLP

15
16 By 

17 David S. Reidy
18 Attorneys for Defendant
19 CLEAR CHANNEL OUTDOOR, INC.
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REED SMITH LLP
A limited liability partnership formed in the State of Delaware

PROOF OF SERVICE

Re: *Richard Traverso v. Clear Channel Outdoor, Inc.*
SFSC No. CUD-07-622321; usdc c07-3629

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, Two Embarcadero Center, Suite 2000, San Francisco, CA 94111-3922. On **September 18, 2007**, I served the following document(s) by the method indicated below:

**REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS UNLAWFUL DETAINER COMPLAINT OF
PLAINTIFF RICHARD TRAVERSO**

- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.
- ☐ by placing the document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below.

Richard A. Sipos, Esq.
Aiken, Kramer & Cummings, Inc.
1111 Broadway
Oakland, CA 94607
Tel: 510/834.6800; Fax: 510.834.9017
(Attorney for Plaintiff Richard Traverso)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **September 18, 2007**, at San Francisco, California.


Victoria Fedoroff

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